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IN THE

Supreme Court of the United States

FRED O. DICKINSON, III, ET AL.,
Petitioners,

v.

MARY ANN COLLIER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondents' principal argument is that review is premature – that the State officials should wait until a class is certified, judgment entered, and Florida's risk-management fund bankrupted, to find out whether this DPPA claim is barred and the officials are entitled to immunity from suit. This Court's preference to review final decisions is irrelevant in this setting, where no material facts are disputed and where issues of Eleventh Amendment and qualified immunity are raised, meaning that the officials' important right to avoid the disruption and burdens of litigation is at stake. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-27 (1985).

The opposition brief fails to grapple with the premises of the petition which are that the legal questions presented are important and that the lower court's errors need to be corrected immediately due to the extensive litigation against state officials in Florida and throughout the Nation. The court below fundamentally misread the DPPA, and authorized a cause of action for billions of dollars in damages against State officials personally, solely for complying with Florida law – a cause of action precluded by the DPPA, the Eleventh Amendment and qualified-immunity principles. As the Imagitas *amicus* brief (pp. 8-9) shows, if this Court does not address the question here, it is unclear when another opportunity will arise. The *in terrorem* effect of the lower court's ruling will mean that State officials will overcomply with the DPPA to avoid disastrous liability. The petition should be granted.

ARGUMENT

I. THE DPPA DOES NOT AUTHORIZE PERSONAL-CAPACITY SUITS FOR DAMAGES AGAINST STATE OFFICIALS IN THESE CIRCUMSTANCES.

A. Respondents' first strawman argument is that no conflict exists concerning whether plaintiffs may file personal-capacity suits for damages against state officials because courts have *sometimes* found that state officials are "persons" under the relevant statutes. Opp. 11-12. From this, respondents erroneously conclude that the DPPA and other statutes authorize *all* personal-capacity suits against state officials.

Under the DPPA, state officials are "persons" for some purposes – *i.e.*, if they disclose driver's license information for personal reasons – but are *not* "persons" when they are sued solely for complying with state laws and policies, and when the only beneficiary of the disclosure of such information is the state. See Pet. 15. In such circumstances, state officials cannot be distinguished from the state. Respondents do not assert that these officials were lining their pockets or otherwise personally motivated; the sole allegation is that the officials complied with Florida law that was preempted by federal law. Such allegations are exclusively subject to enforcement by the Attorney General under DPPA § 2723. Only "[a]dditional unlawful acts," 18 U.S.C. § 2722 – that is, acts other than those pursuant to state laws and policies – give rise to private causes of action against "persons."

Nor is there anything "strange" about the fact that personal-capacity suits against state officials are permitted in some settings, and forbidden in others

(where the nature of the conduct means that the "person" is in fact the state). Opp. 12 & n.5. In attempting to distinguish *Butler* v. *City of Prairie Village, Kansas*, 172 F.3d 736 (10th Cir. 1999), and *Lizzi* v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), respondents ignore that the federal statutes at issue (the ADA and the FMLA) authorize suits against "any person[s]," and yet the courts refused to allow personal-capacity suits against state employees implementing state policy as supervisors. As *Lizzi* explained, "even if Lizzi had actually used the phrase 'individual capacity,' his complaint could not stand." *Id.* at 136-37. Otherwise, "[p]laintiffs like Lizzi would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." *Id.* at 137. That evasion is precisely what the decision below allows.

B. To gain time for the coercive effect of class certification, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), and the *in terrorem* effect of massive financial liability to work, respondents next argue that the petition was premature, Opp. 13-15, relying on *Fidelity Federal Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in the denial of certiorari). But *Kehoe* states that an "enormous *potential* liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Id.* at 1051 (emphasis supplied). Respondents' class action includes almost all Florida drivers and seeks $2,500 in *liquidated damages* per driver. Even a small award for each class member, accordingly, would result in personal liability of *billions* of dollars.

Moreover, contrary to respondents' contention (Opp. 14), this case differs significantly from *Kehoe*.

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Petitioners are State officials; Congress crafted the DPPA to prevent States and state officials from facing enormous potential liability based on the enforcement of state laws. Indeed, principles of Eleventh Amendment and qualified immunity should have forestalled further litigation here, militating strongly in favor of immediate review. See *Mitchell*, 472 U.S. at 526 ("immunity from suit . . . is effectively lost if a case is erroneously permitted to go to trial")(emphasis omitted); *Fed. Mar. Comm'n* v. *S. C. Ports Auth.*, 535 U.S. 743, 766 (2002). Even if respondents' reading of the DPPA were to be adopted, it was not clearly established law. See *infra*.

Respondents next observe that the State may not be required to indemnify its officials for the liability incurred here, as if that factor favors delay. Opp. 14-15. If state officials are personally liable in the billions of dollars solely for complying with state law, individuals of sound judgment will hastily vacate these jobs or cease to enforce any state law that poses even a remote risk. In the alternative, state risk management funds will be bankrupted by idemnifying employees who comply with state law; no state could have thought indemnification would generate billions in liability under the DPPA. Congress' scheme protected States from this breathtaking exposure under the DPPA; the lower court's erroneous ruling has put Florida in this bind.

Respondents do not identify any interest served by delaying adjudication. The Court has traditionally found that "where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259

(8th ed. 2002). The petition presents recurring, clear-cut questions of law that are exceedingly important, particularly to the numerous officials subject to personal-liability suits for performing their state- law duties in alleged violation of the DPPA. What Congress intended should be decided now.[1]

C. Finally, respondents claim that the word "person" in the DPPA includes state officials sued in their personal capacities, even if the sole contention is that the state officials were complying with otherwise lawful state laws and policies. As noted, respondents' lengthy demonstration that suits against state officials are *sometimes* suits against "persons" is immaterial. The critical question is *when* a state official is acting in a "personal capacity." These Florida officials were not.

Incantation of the term individual capacity or personal capacity is insufficient to transform an official-capacity suit into litigation against a person *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986). That is true under the DPPA, as under other federal statutes designed to limit the States' liability in private damages actions.

The State officials agree with respondents on one point. This decision is the first of its kind under the DPPA. Its immediate impact, accordingly, is "only"

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[1] Respondents claim that even if they lack a DPPA claim against the State officials, they can use § 1983 to enforce the same rights. This is wrong, as explained at Pet. 18 n.4, and in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). The question is "whether Congress meant the judicial remedy expressly authorized by the [DPPA] to coexist with an alternative remedy avialable in a § 1983 action." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120-21 (2005). If Congress foreclosed a private damages remedy against state officials, that remedy is equally unavailable under § 1983.

the litigation of this and other class actions seeking billions in damages from state officials under the DPPA, potentially bankrupting state risk-management funds, altering state law, and driving state officials from public service. These effects demonstrate the urgent need for review.

II. THE ELEVENTH AMENDMENT BARS SUITS AGAINST STATE OFFICIALS BASED SOLELY ON THEIR FULFILLMENT OF STATE-LAW DUTIES.

A. The DPPA should not be interpreted to authorize private parties to bring personal-capacity suits for money damages against state officials based solely on their fulfillment of duties *mandated* by state law. But if the DPPA is so interpreted, it violates the Eleventh Amendment. This Court has instructed that courts must look behind the personal-capacity label and determine whether a suit is actually against the state, *Bender*, 475 U.S. at 543, but has not elaborated on the factors that distinguish personal-capacity suits from official-capacity suits. If any case involves artful pleading to evade the Eleventh Amendment, this case does. In all but name, respondents' claim is against Florida; the State officials could not pay even a penny to each class member, nor could they alter state law.

Other courts of appeals have interpreted the word "person" in analogous statutes and circumstances to *exclude* state officials, avoiding the Eleventh Amendment bar. The court of appeals' failure to do so here warrants this Court's attention.

Respondents' purported distinctions of the cases cited by petitioners fail. In these cases, the courts of appeals heeded this Court's injunction that courts look behind the personal-capacity label and

determine whether a suit is actually against the state. Thus, in *United States ex rel. Gaudineer & Comito, LLP* v. *Iowa*, 269 F.3d 932, 937 n.3 (8th Cir. 2001), the court found (as respondents note, Opp. 20) that it was unnecessary to decide the Eleventh Amendment question. But that was *because the court declined to interpret the word "person" in the FCA to authorize a personal-capacity suit against state officials alleged only to have performed state law duties.* The same was true in *Smith* v. *United States*, 287 F.2d 299, 303-04 (5th Cir. 1961), and *United States ex rel. Dunleavy* v. *County of Delaware*, 279 F.3d 219, 221 (3d Cir. 2002), holding that *government* officials accused only of performing official duties are not "persons" under the FCA. Respondents note that the officials in *Smith* and *Dunleavy* were not *state* officials – a distinction irrelevant to whether they are "person[s]."

Respondents also brush aside the cases holding that plaintiffs cannot circumvent limits on state liability for suits under the FLSA and the FMLA by suing individual state-official supervisors in personal-capacity suits for enforcing state laws and policies. Opp. 21. But these courts recognized that "a suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state [– *i.e.*, "to force the state to accede to their view of the Act and to pay them accordingly" –] is barred." *Luder* v. *Endicott*, 253 F.3d 1020, 1023, 1204 (7th Cir. 2001). See also *Montgomery* v. *Maryland*, 266 F.3d 334, 340 (4th Cir. 2001) ("the state is the real party in interest when an official is sued for damages for official acts under the FMLA"). These applications of Eleventh Amendment principles cannot be reconciled with the decision below.

B. As with the DPPA issue, respondents assert that the interlocutory posture of the case should preclude consideration of the Eleventh Amendment claim. For the reasons set forth *supra* at 3-5, that assertion is wrong. As the Imagitas *amicus* brief persuasively shows, States and state officials face ruinous liability *now*. Imagitas Br. at 8-9.

C. Respondents' further claim – that there is some question about whether the State officials' disclosures were required by state law – is wrong. The district court, in ordering discovery about qualified-immunity issues, stated: "Florida law conflicted with the DPPA at the time of the alleged wrongful conduct. *Compare, e.g.*, 18 U.S.C. § 2721, to § 119.07(aa), Fla. Stat. (2000)." App. 53a-54a. The court later held, in granting qualified immunity, that "at the time of [the officials'] conduct, a Florida statutory provision governed the release of records by the [Department.]" *Id.* at 40a-42a (citing Fla. Stat. § 119.07(aa) (2003)). Respondents' statement that "the lower courts have never resolved the question" (Opp. 22-23) is thus wrong. The court of appeals simply *assumed,* as the district court had found, that state law required the officials to disclose the information. App. 10a n.3.

Florida law indubitably required the State officials to disclose drivers' license information. Pet. 8-9. Respondents fail *even to cite* the relevant statutes, which require State officials to disclose that information unless the person to whom it pertained affirmatively requested confidentiality. See Fla. Stat. § 119.07(3)(aa) (effective until Oct. 1, 2003); *id.* § 320.05(3)(a). Contrary to respondents' brief (Opp. 23 n.9), it is irrelevant what form the disclosures took. And, again contrary to respondents' brief (*id.*), Florida's Constitution does not provide a right of privacy in public records. *Michel* v. *Douglas*, 464 So.

2d 545, 546 (Fla. 1985). Instead, under Florida's Constitution Art. I, § 24, the public has a right of access to this data received in connection with the transaction of public business. The State officials made disclosures required by Florida law. The questions presented arise in that context.[2]

Finally, respondents claim that the Eleventh Amendment does not bar personal-capacity suits in this setting because state officials can be personally liable for acts "within the official's authority and necessary to the performance of governmental functions." *Hafer* v. *Melo*, 502 U.S. 21, 28 (1991). Officials *can* be personally liable for such acts, but are not when the individual officials comply with state law, do not act for personal benefit, cannot provide any meaningful remedy, and when judgment for plaintiffs necessitates a change in state law. These factors demonstrate that the suit is against the state. None of this Court's cases cited by respondents remotely suggests that personal-capacity suits can be used to circumvent Eleventh Amendment immunity. In *Hope* v. *Pelzer*, 536 U.S. 730 (2002), this Court denied qualified immunity to prison employees in part because they *violated* state policy embodied in Department of Corrections regulations. *Guinn* v. *United States*, 238 U.S. 347 (1915), involved a *fine*

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[2] The *Government-in-the-Sunshine Manual* (cited at Opp. 7) is prepared by the Florida Attorney General, the office filing this petition. It is general resource material, not law.

Respondents also argue that petitioners failed to "notify the Attorney General of their constitutional challenge" to the DPPA. Opp. 24. Petitioners raise no such challenge; they maintain that the court of appeals interpreted DPPA in a way that cannot be reconciled with the Eleventh Amendment.

under a *penal* code provision, not any claim of Eleventh Amendment or qualified immunity.[3]

III. THE STATE OFFICIALS WERE ENTITLED TO QUALIFIED IMMUNITY.

The court of appeals made two legal errors in its qualified-immunity analysis. Those errors, not any "fact-bound determination" (Opp. 28), are the subject of this petition.

First, the circuit court gave the back of its hand to the State officials' compliance with their state-law duties, overturning the district court's considered view that the State officials acted reasonably in light of conflicting obligations. See App. 40a (State officials "were faced with a difficult executive-level policy decision; indeed, they were stuck between a proverbial 'rock and a hard place'"). Respondents cite the Supremacy Clause and *Ex Parte Young*, 209 U.S. 123 (1908), in asserting that the State officials *knew* that their state-law obligations were preempted. Opp. 29. But the district court ruled otherwise. The State officials' conduct is not *malum in se*; it was, at worst, *malum prohibitum*, and specific notice of unlawfulness is necessary. Cf. *Staples* v. *United States*, 511 U.S. 600 (1994).

Respondents' citations of this Court's cases are inapt. As noted *supra*, *Hope* denied prison officials qualified immunity in part because they *violated* state regulations. Neither *Lane* v. *Wilson*, 307 U.S. 268 (1939), nor *Nixon* v. *Herndum*, 273 U.S. 536

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[3] Respondents also argue that a state's decision to indemnify its officials does not by itself immunize those officials from personal liability. Opp. 26-27. That is not petitioners' argument. Our contention is that the billions in damages sought, in conjunction with other factors, demonstrates that the claims are against the State. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974).

(1927), addresses qualified immunity; both find state laws unconstitutional and remand.

Moreover, respondents' argument misses the mark. Positive-law duties are not dispositive, but are "important" to the qualified-immunity analysis. *Wilson* v. *Lane*, 526 U.S. 603, 617 (1999). The district court so held, but the appellate court erroneously treated the State officials' state-law obligations as irrelevant.

Second, respondents say that the State officials' reasonable belief that Florida drivers lacked any private cause of action against them is *irrelevant* to the qualified-immunity analysis. Opp. 28-31. As stated at Pet. 26-27, respondents are wrong to sever the federal right from its federal remedy in analyzing qualified immunity. See *Dennis* v. *Higgins*, 498 U.S. 439, 447 n.7 (1991) (a right is "'[a] legally enforceable claim of one person against another'") (quoting *Black's Law Dictionary*). If respondents lack a legally enforceable claim against petitioners, they have no right. Respondents' cases (Opp. 31) speak in terms of "conduct" because they present no question whether a private cause of action exists.

Nor is there any question of "get[ting] away with the violation." *Id.* at 32. The Attorney General is authorized to challenge state laws under the DPPA. Moreover, petitioners' point is not that reasonable doubt about the cause of action is dispositive. Instead, confronted with conflicting obligations, petitioners reasonably chose to comply with Florida law, in part because it was unclear whether private plaintiffs had any cause of action against them for doing so.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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